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JOHN F. DAVIS, CLE

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IN THE

Supreme Court of the United States

October Term, 1965.

No. ~~[illegible] Misc.~~ 762 76

SYLVESTER JOHNSON and STANLEY CASSIDY,
Petitioners,

vs.

STATE OF NEW JERSEY,
Respondent.

BRIEF IN PARTIAL OPPOSITION TO WRIT OF CERTIORARI.

NORMAN HEINE,
Camden County Prosecutor,
Court House,
Camden, New Jersey.

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STATEMENT OF POINTS INVOLVED.

I. The prosecutor's summation and the charge of the trial court were not violative of defendants' constitutional rights. (Points 1 and 2 of Petition.)

A. The defendants having conceded their guilt of first-degree murder, comment by the trial court and prosecutor on defendants' failure to testify did not influence the jury in the determination of defendants' guilt.

B. Assuming the applicability of *Griffin v. California*, this decision should not apply retroactively.

II. The summation of the prosecutor was proper. (Points 3 and 4 of Petition.)

III. The case, *sub judice*, is inapposite to *Escobedo v. Illinois*, nevertheless, the State urges the granting of petitioners' writ of certiorari as to this issue. (Point 5 of Petition.)

A. The holding of *Escobedo* should not be extended to apply to those cases where the defendant failed to ask for counsel.

B. Even if the holding in *Escobedo* should be extended it should not be applied retroactively.

IV. The alleged delay in arraignment does not invalidate the confessions. (Point 6 of Petition.)

V. Petitioner, Cassidy, was not deceived and induced to turn over a gun to the authorities as the result of allegedly false statements to the prosecutor. (Point 7 of Petition.)

VI. The mere fact that Wayne Godfrey's confession was found to be involuntary by the Circuit Court of Appeals does not require a reversal of petitioners' case. (Points 8 and 9 of Petition.)

ARGUMENT.

I.

THE PROSECUTOR'S SUMMATION AND THE CHARGE OF THE TRIAL COURT WERE NOT VIOLATIVE OF DEFENDANTS' CONSTITUTIONAL RIGHTS.

A.

The defendants having conceded their guilt of first-degree murder, comment by the Trial Court and prosecutor on defendants' failure to testify did not influence the jury in the determination of defendants' guilt.

The defendants chose not to take the stand in their own behalf and their reasons for not doing so were made abundantly clear by their counsels' opening and closing statements.

Cassidy's lawyer, in his opening to the jury, stated:

> "I have made up my mind to one thing, I am not going to try to fool you, members of the jury, I am not going to put forth any sham defense. Because if I do, I feel I am going to harm my client. Because I feel that you members of the jury would be able to see through it at once. I intend to listen to these facts as presented by the State as to how this alleged crime took place. At the close of the State's case it is my intention to present the defense to this case as I would, naturally, in any other case, but certainly in a case which is a capital case, with the truth, and I feel confident that, members of the jury, when you have heard

all the evidence in this case, whatever your verdict may be, that the verdict that you give will be given after you consider all the facts and after you consider all the mitigating and extenuating circumstances, and I feel certain that that verdict will be given without any partiality or bias.

"That is what I ask of you members of the jury, to give a true and honest verdict in accordance with the facts of this case" (JA234a).

In his summation he stated:

"Great mention was made, and undoubtedly will be further made, by the prosecutor, to the fact that the defendant failed to take the stand, and because he did not take the stand, we may all assume that he did not (1752) do so because he could not deny that which is charged. That is an honest statement. The action of the defendant was an honest act. He has not taken the stand to conjure up stories and lies. The facts are as they are presented" (JA270a).

Johnson's lawyer, in his opening, stated:

"As carefully as you listen, that is how carefully I shall listen. For, I, too, am concerned with the facts and with the truth, as you are. You too will listen to all the facts and will consider and determine that they all be true. If something is not true, we do not want it. If something is not factual, we do not want it, whether it be for the good of the defendants, whether it be bad for the defendants, in favor or against the State. All we do want are the truthful facts, that which happened. For then, in that manner, we can determine how to close our case to you and you in turn deliberate and determine a fair verdict" (JA235a).

In his summation, he stated:

"I also think that I can anticipate that the Prosecutor will have much to say to you in regard to the fact that the defendant did not take the stand. And I believe that the Prosecutor will charge you—rather, have the court charge you, that the failure of the defendant to take the stand from that fact, that you may infer or believe that the defendant could not successfully answer the evidence or charges against him.

"Now, members of the jury, I think the Prosecutor will dwell upon that, I believe he has already earlier this afternoon.

"I told you members of the jury at the beginning of this case that I had made up my mind that we were not going to present any trick defense, that we were not going to try to fool you, and that we were going to ask the State to prove their case according to law, and I think that we have done that.

"I have told you that the defendants were entitled to have the charges against them proven against them according to law.

"And, members of the jury, the reason that Sylvester Johnson did not take the stand was because I don't believe and I know that he could not successfully deny these particular charges against him. His confession certainly implicates himself.

"Members of the jury, this case was lost a year ago by the defense. This case was lost when a citizen had the alertness of mind to take down a license number and reported it to the police. This case was lost from that day on. There is no contest here as to who wins or loses the case. No matter what happens, the State wins this case. The evidence as you have heard it shows, and that you can draw from that naturally, that

a robbery was attempted and that during the course of that robbery a killing took place.

"But, members of the jury, you are not compelled by law because you find that a robbery took place or attempted to take place, and that there was a killing in the course of that robbery, to bring in the death penalty. It is not mandatory. And I think that you know that from the questions that we asked you during the time that we questioned you as prospective jurors" (JA281a-JA283a).

The Court in its charge stated:

"None of the defendants took the stand to deny their participation in the crime. Under our law, a defendant cannot be compelled to testify, but he is competent to testify, and he has a right to testify, and his failure to be a witness in his own behalf is no presumption of guilt and does not erase the presumption of innocence. The failure of the defendants to take the witness stand should not be considered as prejudicial in respect to your determination as to whether or not you should attach to your verdict the recommendation of life imprisonment, in case you, the jury, should find any of the defendants guilty of murder in the first degree. If any inculpatory or incriminating facts are testified to which concern the acts of that particular defendant which he could by his oath deny, his failure to testify in his own behalf raises an inference that he could not truthfully deny those inculpatory or incriminating facts."

It is impossible to conceive of injury to defendants by the prosecutor's or court's comment in view of counsel's position that defendants were, admittedly, guilty of first-degree

murder. The defense conceded defendants' guilt and were devoted exclusively to an attempt to save defendants from the death penalty. Under these circumstances, the comment of the prosecutor and the trial court could not have influenced the jury in the determination of defendants' guilt. *State v. Johnson,* 43 N. J. 527, 591, 206 A. 2d 737, 747 (1965).

The case, *sub judice,* is distinguishable from *Griffin v. California,* in that, in *Griffin* the defendant contested his guilt. Here guilt is admitted and the only question the defendants submitted to the jury was the extent of punishment.

B.

Assuming the applicability of Griffin v. California, this decision should not apply retroactively.

A reversal of these convictions bottomed on *Griffin v. California,* 380 U. S. 609 (1965), would require retroactive application of a factually distinguishable precedent.

We note that this court has recently granted certiorari on the issue of retroactive application of *Griffin* in an Ohio habeas corpus proceeding. *U. S. ex rel. Shott v. Tehan,* 339 F. 2d 990 (6th Cir.), cert. granted May 24, 1965, 33 L. W. 3376. In that case, as well as in *Griffin,* the defendant contested the issue of his guilt and offered no explanation for his failure to testify. But, in the case *sub judice,* the guilt of defendants was *not* in issue. See counsels' statements, supra.

The State concedes that *Griffin v. California,* supra, prohibits comment where a defendant stands to be injured by virtue of his exercise of a constitutional right (not to testify). However, as the New Jersey Supreme Court found

below, the comment by the prosecutor could *not* have adversely affected defendants' constitutional rights to a fair trial. *State v. Johnson,* supra. The New Jersey Supreme Court made specific reference to its earlier holding that the prosecutor's remarks did not prejudice the substantial rights of the defendants in view of the trial court's clear instruction to the jury that the failure to testify should not be considered in the determination of whether or not to recommend life imprisonment. *State v. Johnson,* 31 N. J. 489, 512, 158 A. 2d 11, 24 (1960), as cited at 43 N. J. 572, 591, 206 A. 2d 737, 747 (1965). (See trial court's charge, supra.)

The circumstances of this case do not appeal to our "deepest sentiment of justice", and, hence, do not warrant a retroactive application of *Griffin's* interpretation of the *Malloy* rule (*Malloy v. Hogan,* 378 U. S. 1). *State v. Johnson,* 43 N. J. at 583.

In *Linkletter v. Walker,* 381 U. S. 618 (1965), the most recent pronouncement of the Supreme Court upon the retrospective application of constitutional judicial decision, held the rule of *Mapp v. Ohio,* 376 U. S. 643 (1961), not retrospective in application. *Mapp,* as does the present case, are concerned with the application of a rule of evidence. Here, as in *Linkletter,* to apply the rule retrospectively would serve as a foundation for upsetting convictions in a large number of cases decided long ago wherein the accused failed to testify and the court and prosecuting attorney commented on such facts in accordance with procedures authorized by New Jersey by statute. Release, again, as in *Linkletter,* would not be based on the innocence of the accused, but on a newly declared ruling first announced long after the time of conviction. Such retrospective application of that newly declared ruling would not benefit the honest citizen but would serve only to create a new method whereby convicted felons could avoid their con-

viction. See *Pinch v. Maxwell*, 34 L. W. 2190 (Ohio Sup. Ct., September 29, 1965); *In Re Gaines*, 34 L. W. 2114 (Calif. Sup. Ct., August 20, 1965).

II.

THE SUMMATION OF THE PROSECUTOR WAS PROPER.

The allegations of the impropriety of the prosecutor's summation has heretofore been decided in the Supreme Court of New Jersey. *State v. Johnson*, 31 N. J. 489, 509, 513, 159 A. 2d 11 (1960). At that time the court determined that the graphic summation of the prosecutor was justified by the evidence. This matter was again considered by the New Jersey Supreme Court which again declared it was completely satisfied that defendant's rights to a full and fair trial were not denied by the prosecutor's summation.

> "The defendants finally contend that the prosecutor's summation to the jury was so inflammatory that it deprived them of due process of law. The character of the prosecutor's remarks were fully considered by this court on the defendants' direct appeal and we were completely satisfied that the defendants' right to a full and fair trial was not denied." *State v. Johnson*, 43 N. J. 572, 596, 206 A. 2d 737, 750 (1965).

The defendants further contend that the prosecutor's comment about the failure of the defendants to take the stand suggested to the jury that they should consider that failure on the issue of punishment. The prosecutor's remarks were considered by the New Jersey court, *State v. Johnson*, supra, 31 N. J. at 512, which declared:

> "In view of the trial court's clear instructions that the defendants' failure to testify should not be considered by the jury in their determination whether to recommend life imprisonment—the only real issue before the jury—we are satisfied that the remark did not prejudice the substantial rights of the defendants."

The New Jersey Supreme Court, in re-examining this issue on defendants' petition for post-conviction relief, stated that:

> "Therefore, we conclude that the comment of the prosecutor and the trial court could not have adversely affected defendants' rights to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment." *State v. Johnson*, 43 N. J. 591, 206 A. 2d 737 (1965).

III.

THE CASE, SUB JUDICE, IS INAPPOSITE TO ESCOBEDO v. ILLINOIS, NEVERTHELESS, THE STATE URGES THE GRANTING OF PETITIONERS' WRIT OF CERTIORARI AS TO THIS ISSUE.

A.

The holding of Escobedo should not be extended to apply to those cases where the defendant failed to ask for counsel.

Defendants allege the denial of an opportunity to consult with counsel and a failure of the police to advise them of their rights to remain silent prior to their confessions. These allegations were made, for the first time, in their

affidavits submitted to the New Jersey Supreme Court over six years after their original trial. Relying upon *Escobedo v. Illinois*, 378 U. S. 478 (1964), they conclude that their constitutional rights have been so violated as to require a reversal of their convictions.

There is hardly an issue of criminal constitutional law which has divided the courts more than the issue of whether the holding of *Escobedo* should be extended to apply to those cases where the defendants did not request the assistance of counsel. New Jersey has answered this question in the negative.[1] Other jurisdictions hold similarly.[2]

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[1] **State v. Ordog**, 45 N. J. 347 (1965); **State v. Lanzo**, 44 N. J. 560 (1965); **State v. Bindhammer**, 44 N. J. 372 (1965); **State v. Hodgson**, 44 N. J. 151, 162-163 (1965); **State v. Vigliano**, 43 N. J. 44 (1964); **State v. Smith**, 43 N. J. 67 (1964), cert. den. 379 U. S. 1005 (1965); **State v. Scanlon**, 84 N. J. Super. 427 (App. Div. 1964).

[2] **People v. Hartgraves**, 202 N. E. 2d 33 (Ill. 1964), cert. den.; **People v. Lewis**, 207 N. E. 2d 65, 66 (Ill. 1965); **People v. Golson**, 207 N. E. 2d 782 (Pa. 1964); **Comm. v. Coyle**, 203 A. 2d 782 (Pa. 1964); **Comm. v. Patrick**, 206 A. 2d 295, 299 (Pa. 1965); **Browne v. State**, 131 N. W. 2d 169 (Wis. 1964); **State v. Upchurch**, 141 S. E. 2d 528, 531 (No. Car. 1965); **State v. Elam**, 263 N. C. 273, 139 S. E. 2d 601, 607 (No. Car. 1965); **State v. McLeod**, 203 N. E. 2d 349 (Ohio 1964); **Cowans v. State**, 209 A. 2d 552 (Md. 1965); **Anderson v. State**, 205 A. 2d 281 (Md. 1964); **State v. Hall**, 397 P. 2d 261, 264-265 (Idaho 1964); **State v. Worley**, 132 N. W. 2d 764 (Neb. 1965); **Morford v. State**, 395 P. 2d 861 (Nev. 1964); **Bean v. State**, 398 P. 2d 251, 253-255 (Nev. 1965); **State v. Fox**, 131 N. W. 2d 684 (Iowa 1964); **People v. Gunner**, 15 N. Y. 2d 226, 205 N. E. 2d 852 (N. Y. 1965); **Comm. v. Roy**, 207 N. E. 2d 284, 288 (Mass. 1965).

Intermediate appellate courts further support our position: **People v. Agar**, 253 N. Y. S. 2d 761 (1964); **Davis v. State**, 388 S. W. 2d 940, 941 (C. C. A. Tex. 1965); **People v. Scanlon**, 84 N. J. S. Ct. 427, 202 A. 2d 448 (1964); Cf. **State v. Neely**, 398 P. 2d 482 (Ore. 1965); **State v. Dufour**, 206 A. 2d 82 (R. I. 1965); **State v. Mendes**, 210 A. 2d 50, 52-54 (R. I. 1965); **Galarza Cruz v. Delgado**, 233 F. Supp. 944, 948 (D. Puerto Rico 1964).

See too, **State v. Winsett**, 205 A. 2d 510, 525 (Del. Super. Ct. 1964); **Ward v. Comm.**, 205 Va. 564, 138 S. E. 2d 293 (Va. 1964); **Biddle v. Comm.**, 141 S. E. 2d 710, 713; **State v. Longmore**, 134 N. W. 2d 66 (Neb. 1965); **United States v. Ogilvie**, 334 F. 2d 837, 843 (7th Cir. 1964); **Long v. United States**, 338 F. 2d 549, 550 (D. C. Cir. 1964); **Jackson v. United States**, 337 F. 2d 136 (D. C. Cir. 1964); **United States v. Childress**, 347 F. 2d 448, 450 (7th Cir. 1965).

The more recent decisions cry out for elucidation by this court so as to put the question to rest.

In *Commonwealth v. Negri*, 34 L. W. 2186-2187 (Pa. S. Ct., September 28, 1965), the court, in commenting on *Russo v. New Jersey*, 33 L. W. 2621 (3d Cir., 1965),[3] declared:

> "The clear indication to this court is to accept and follow the decision of the Third Circuit on this matter until some further word is spoken by the Supreme Court of the United States."

This question has reached such critical proportions that the New Jersey Supreme Court has issued its advisory directive suggesting to the trial courts and prosecutors not to follow the holding in *Russo* until this court decides further in this matter.

Of crucial importance to law enforcement officials is the resolution by this Court of the following questions:

1. Is a free and voluntary confession by a defendant, who has neither requested nor been refused counsel, inadmissible in a State criminal trial by reason of the Constitution of the United States solely because the investigating officers *did not advise him* of his right to consult with counsel and his right to remain silent?

2. Is a free and voluntary confession by a defendant, who has neither requested nor been refused counsel, inadmissible in a State criminal trial by reason of the Constitution of the United States because the prosecution did not establish that the defendant at the time of the questioning made a *knowing and intelligent*

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[3] **Russo v. New Jersey** held that a request for counsel by defendant is not a significant factor in determining if counsel should be provided and that counsel must be provided, assuming there has not been an intelligent waiver of this right, regardless of whether a defendant requests counsel. This decision has, **sub silentio**, applied its holding retroactively.

waiver of both (a) his right to consult with counsel, and (b) his right to remain silent?

3. If so, is such a free and voluntary confession inadmissible where the record does not affirmatively establish that the defendant was not advised of his rights and did not waive them?

B.

Even if the holding in Escobedo should be extended it should not be applied retroactively.

The New Jersey Supreme Court, in the case *sub judice*, assumed for the sake of decision, that the allegations contained in defendants' affidavits were within the principle announced by *Escobedo* (an assumption which it considered unsound), *State v. Johnson*, 43 N. J. 572, 206 A. 2d 737 (1965), but, nevertheless, refused to apply *Escobedo* retroactively. The court analogized *Escobedo* with the holding in *Mapp v. Ohio*, 367 U. S. 643, 81 Sup. Ct. 1684, 6 L. Ed. 2d 1081 (1961), and stated:

> "Where the reliability of the guilt-determining process is seriously impugned there is good reason for applying the new rule to a case already decided. It would offend our sense of justice to continue to incarcerate a convicted man where subsequent consideration cast grave doubts upon the reliability of the determination of his guilt. But where the conviction was obtained as a result of a procedure not considered fundamentally unfair at that time, and subsequent judicial decisions cast no substantial doubts upon the reliability of the determination already made, no compelling reason exists for disturbing a decision no longer subject to direct appeal."

This Court, in *Linkletter v. Walker*, 381 U. S. 618, 14 L. Ed. 2d 601, 85 Sup. Ct. (1965), refused to apply *Mapp* retroactively and declared:

> "Once the premise is accepted that we are neither required to, nor prohibited from applying a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."

In *Commonwealth v. Negri*, 34 L. W. 2186-2187 (Pa. S. Ct., September 29, 1965), it was declared the rule of *Escobedo* is not available to a Pennsylvania prisoner whose conviction became final before *Escobedo* was decided. The court declared:

> "The fact that the accused may not have known that he had a right to remain silent or that he had a right to the assistance of counsel does not in any way negate the fact that the statement was made voluntarily or that the probability of truthfulness is very high. And, while the Fifth Amendment right is against compulsory self-incrimination, we do not think that an accused's ignorance rises to such compulsion.
>
> "We do not think that the purpose of Escobedo was to ferret out unreliable or coerced confessions, any more than the purpose of Mapp was to deny admissibility to irrelevant or unprobative physical evidence. The identical purpose of each was to provide adequate assurance of police adherence to the constitutional principles inherent in due process, by denying fruit to the poisoned seed. See Commonwealth ex rel. Wilson v. Rundle, 412 Pa. 109, 194 A. 2d 143 (1963)."

If we agree that *Escobedo* more nearly resembles *Mapp* than *Gideon*, then we must conclude that *Escobedo* should not be applied retroactively, since this court refused to so apply *Mapp* in the *Linkletter* decision.

This question is equally vexing to the courts and clarification by this Court would be of prime importance.

IV.

THE ALLEGED DELAY IN ARRAIGNMENT DOES NOT INVALIDATE THE CONFESSIONS.

The fact that the defendant is over-detained before arraignment in a state proceeding does not invalidate the confession obtained in the interim. While it is the rule in federal prosecution that confessions obtained in these circumstances must be suppressed, *Mallory v. United States*, 354 U. S. 449 (1957); *McNabb v. United States*, 318 U. S. 332 (1943), this exclusionary rule is a function of the supervisory power of the federal courts over federal prosecution and does not rise to the dignity of a constitutional prohibition. *Colombe v. Connecticut*, 367 U. S. 568 (1961); *Stroble v. California*, 343 U. S. 181, 197 (1952); *Gallegos v. Nebraska*, 342 U. S. 55 (1951). No reason is advanced to warrant a change of this court's position. New Jersey has not altered its position. *State v. Ordog*, supra.

V.

PETITIONER, CASSIDY, WAS NOT DECEIVED AND INDUCED TO TURN OVER A GUN TO THE AUTHORITIES AS THE RESULT OF ALLEGEDLY FALSE STATEMENTS TO THE PROSECUTOR.

The Third Circuit Court of Appeals touched on this point and made the following observation:

> "The only evidence of any improper conduct during this two-hour interval appears in Cassidy's testimony at the hearing on motion for a new trial, where he testified as follows:
>
> 'I remember when I made my first confession, I told Chief Dube that I didn't have the gun and the prosecutor came and got me and asked me did I have a gun at home at all. I said no at first, because the gun did not belong to me. He said, "Well, look, if you have a gun at home, all we want to do is to check it, (to) see if it has been fired." He said, "We won't use this as evidence against you if it hasn't been fired."'
>
> "If the prosecutor did give the prisoner this assurance, it is arguable that the rules of evidence should exclude an admission thus obtained in exchange for a promise of favorable treatment. See Shotwell Mfg. Co. v. U. S., 371 U. S. 341, 348 (1963) (dictum) (federal prosecution); Crawford v. U. S., 5th Cir. 1955, 219 F. 2d 207 (semble) (federal prosecution). See generally *Bram v. U. S.*, 168 U. S. 532 (1897) (federal prosecution); Maguire, Evidence of Guilt (1959), p. 139. But such a bargain is an improper means of persuasion rather than a device of compulsion. It may produce a

statement that is untrustworthy because a suspect may be induced to incriminate himself falsely when he is led to believe that, all things considered, he will gain thereby. But bargaining for a confession is not shocking and outrageous in the way that third degree methods are. Probably for this reason, courts have not heretofore made the rule which excludes testimony induced by promise of favor a constitutional mandate.

"Cassidy did not assign as a basis for his motion for a new trial or as a ground for federal habeas corpus that his admission concerning his gun had been induced by a promise not to use this evidence against him. Thus, no ruling in this regard is presented for appellate review. In thus disposing of the matter, we do not hold or imply that a finding of such inducement would entitle the prisoner to relief on constitutional grounds." 327 F. 2d 311, 317 (1964).

There is nothing in the Circuit Court's opinion which suggests that this question is of sufficient importance to even warrant this Court's consideration. This is beside the point that, since it was not raised properly below, either at the State level or at the Federal District Court level, it is not a proper subject for review.

VI.

THE MERE FACT THAT WAYNE GODFREY'S CONFESSION WAS FOUND TO BE INVOLUNTARY BY THE CIRCUIT COURT OF APPEALS DOES NOT REQUIRE A REVERSAL OF PETITIONERS' CASE.

This point was considered and disposed of adversely to these petitioners by the same court that voided the Godfrey confession, when it stated:

"Finding only Godfrey's confession to have been involuntary on the record before us, we have considered whether the admission of that confession itself affected the constitutional rights of Cassidy and Johnson. The introduction of a coerced confession in evidence against one defendant is not in itself the imposition of constitutional wrong upon his co-defendant. Stein v. New York, supra, 346 U. S. (156) at 194-196, 73 S. Ct. (1077) at 1097-1098 (97 L. Ed. 1522); Malinski v. New York, supra, 324 U. S. (401) at 410-412, 65 S. Ct. (781) at 786 (89 L. Ed. 1029). The jury was instructed to consider each confession as evidence against its maker only. And here we have the additional consideration that substantially the same information was placed before the jury in the confessions of Cassidy and Johnson as in the confession of Godfrey. In these circumstances, we think it is not reasonable to believe that the jury would or, indeed, had any occasion to go beyond Cassidy's and Johnson's own confessions and use similar statements in Godfrey's confession against them." Id., at pp. 318-319.

The New Jersey Supreme Court found itself in accord. *State v. Johnson*, 43 N. J. 594, 206 A. 2d 737, 748-749 (1965).

Petitioners still rely on *Ashcraft v. Tennessee*, 322 U. S. 143 (1944), as requiring reversal of their convictions. *Ashcraft v. Tennessee*, supra, is clearly inapposite. In *Ashcraft*, this Court remanded and reversed the conviction of defendant Ware, who did not confess, because co-defendant Ashcraft's confession, introduced at their joint trial, was found to be involuntary. The Court noted:

"Ware's conviction was sustained by the Tennessee Supreme Court on the assumption that Ashcraft's confession was properly admitted and his conviction valid. Whether it would have been sustained had the court

reached the conclusion we have reached as to Ashcraft, we cannot know.

"Doubt as to what the State court would have done under the changed circumstances brought about by our reversal of its decision as to Ashcraft is emphasized by the position of the State's representatives in this court."

In the case *sub judice*, neither the trial court nor the New Jersey Supreme Court based its finding of voluntariness of petitioners' confessions on the assumption that co-defendant Wayne Godfrey's confession was valid. Both petitioners independently made voluntary confessions acknowledging their participation in the crime.

In *Malinski v. New York*, 324 U. S. 401 (1945), the Court, in a similar case, stated:

> "The furtherest we have gone in a comparable case from a State Court is to vacate the judgment against the co-defendant who did not confess and remand the case to the State Court for further consideration. Thus, in Ashcraft v. Tennessee . . ., we followed that procedure at the suggestion of the Attorney General of the State, where the judgment against the co-defendant who did not confess was sustained by the State Court on the assumption that the confession which we held to be coerced was properly admitted and that the conviction of the defendant who did confess was valid."

CONCLUSION.

For the reasons hereinabove stated, the Petition for Writ of Certiorari should be granted as to Points I and III, but denied as to all other points.

NORMAN HEINE,
Camden County Prosecutor.